1/24/05

STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**
BRANCH 14

SAVE OUR UNIQUE LANDS, INC.,
CLEAN WISCONSIN, INC.,
THOMAS and MARGARET KREAGER,
and GERALD and LINDA CEYLOR,
Petitioners,

vs. **Case No. 04 CV 138**

PUBLIC SERVICE COMMISSION OF WISCONSIN,
Respondent

DECISION AND ORDER REGARDING PETITION FOR JUDICIAL REVIEW

Petitioners Save Our Unique Lands, Inc., Clean Wisconsin, Inc., and Thomas and Margaret Kreager (collectively referred to as "SOUL") and Gerald and Linda Ceylor ("the Ceylors") petitioned this court for review of the Wisconsin Public Service's ("PSC" or "Commission") December 19, 2003 *Order Modifying Final Order* ("the Order") pursuant to Wis. Stats. §§ 196.491(3)(j), 227.52, 227.53, and 227.57. The Order modified the Certificate of Public Convenience and Necessity ("CPCN") granted to the Wisconsin Public Service Corporation, Minnesota Power, and American Transmission Company (collectively "the applicants"), permitting them to build a 345kV transmission line from the Arrowhead Substation near Duluth, Minnesota to the Weston Substation near Wausau, Wisconsin. (*Order Modifying Final Order*, Docket No. 05-CE-113, December 19, 2003, page 1.)

The issues for review are: did the PSC 1) violate Wis. Stat. §196.491(3)(e) by granting the CPCN before DNR permit approval; 2) violate Wis. Stat. §1.11 by failing to prepare a Supplemental Environmental Impact Statement ("SEIS"); 3) fail to follow the procedure mandated by Wis. Stat. §196.24(3) and a complete decision matrix; 4) fail to comply with the

Energy Priorities Law, Wis. Stat. §1.12; and 5) act outside the scope of its authority by requiring the applicants to submit farm disease mitigation plans for its review. These inquiries can be answered in the negative. Therefore, the PSC's order is affirmed.

BACKGROUND

On October 30, 2001, the PSC issued a CPCN for the construction of the Arrowhead-Weston transmission line. Approximately one year later, on November 26, 2002, the applicants petitioned the PSC to amend its 2001 decision with a revised cost estimate, a new effective date, and several project changes, including the use of fiber optic cable. Administrative Law Judge David Whitcomb held technical and public hearings on these issues between September and November 2003. Commission decision-makers did not attend these hearings.

On December 19, 2003, the PSC issued the *Order Modifying Final Order*, in which it approved the project cost of $420,308,000, authorized the use of fiber optic cable, and made the CPCN effective on December 20, 2003. Furthermore, the PSC determined that it was not required to create an SEIS in light of the changes to the project. On January 14, 2004, SOUL petitioned this court for judicial review of the amended order; the Ceylors followed suit on January 15, 2004 in Price County. The Ceylor action was then consolidated with the SOUL proceeding here in Dane County. Wis. Stat. 227.53(1)(a)3.

STANDARD OF REVIEW

The petitioners have brought their petitions for review under Wis. Stats. §§ 196.491(3)(j), 227.52, 227.53, and 227.57. Wis. Stats. §§227.52 through 227.57 govern the judicial review of

agency decisions, while Wis. Stat. §196.491(3)(j) allows all parties affected by a CPCN issued by the PSC to petition for judicial review under Wis. Stats. chapter 227.

A court's review of an administrative agency's decision under chapter 227 is governed by several different standards. First and foremost, "unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of [Wis. Stat. §227.57], it shall affirm the agency's action." Wis. Stat. §227.57(2). An agency's findings of fact are reviewed under the 'substantial evidence' test, under which findings of fact must be "supported by substantial evidence in the record." Wis. Stat. §227.57(6). Finally, an agency's statutory interpretations and conclusions of law may be entitled to judicial deference.

SOUL is mistaken in its assertion that de novo review is always appropriate for an agency's interpretation of its own administrative rules and should also be used for statutory interpretation. SOUL cites *Trott v. DHFS, 2001 WI App 68 ¶4, 242 Wis.2d 397, 402, 626 N.W.2d 48, 51* as conclusively holding "[t]he interpretation of an administrative rule or regulation, like the interpretation of a statute, is a question of law that we review *de novo*." (SOUL's Reply Brief, page 2.) However, the *Trott* court goes on to say,

> Although not bound by an agency's conclusions of law, we generally defer to an agency's interpretation of its rules...applying a 'great weight' standard...An agency's interpretation of its own regulations is accepted even though an alternative may be equally reasonable.

(*Id.*)

Great weight deference is not always the standard to apply when reviewing an agency's statutory interpretation. A court reviews an agency's interpretation of law under one of three levels of deference: great weight, due weight, and no deference. Great weight deference is applied when

> (1) the agency was charged by the legislature with the duty of administering the statute; (2) ...the interpretation of the agency is one of long-standing; (3) ...the agency employed its expertise or specialized knowledge in forming the interpretation; and (4)...the agency's interpretation will provide uniformity and consistency in the application of the statute.

Responsible Use of Rural and Agricultural Land (RURAL) v. Public Service Commission of Wisconsin, 239 Wis.2d 660, 677, 619 N.W.2d 888, 899 (2000). Under this standard, a court "will affirm [an agency's] legal conclusions unless they are unreasonable." *International Paper Company v. Labor and Industry Review Commission, 2001 WI App 248 ¶10, 248 Wis.2d 348, 355, 635 N.W.2d 823, 826.*

Due weight deference is applied to an agency's conclusions of law when "an agency has some experience in the area, but has not developed any particular expertise in interpreting and applying the statute at hand that positions the agency more favorably to interpret that statute than the reviewing court. *RURAL* at 678-679. However, "a court will not overturn a reasonable agency decision that comports with the purpose of the statute unless the court determines that there is a more reasonable interpretation available." *Id.* at 679. Finally, a court should apply no weight deference, or *de novo* review, "where there is no evidence that the agency used any special knowledge or expertise, the issue is clearly one of first impression, or the agency's position on an issue has been inconsistent." *Id.* at 676.

In addition to an agency's determinations of fact and conclusions of law, a court may review an agency's procedures. According to Wis. Stat. § 227.57(4), "the court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure."

DECISION

I. The PSC Did Not Violate Wis. Stat. §196.491(3)(e)

The petitioners' first argument is that the PSC interpreted Wis. Stat. §196.491(3)(e) outside of the scope of its authority. Wis. Stat. §196.491(3)(e) states, in relevant part,

> [t]he commission may not issue a certificate of public convenience and necessity under this subsection until the [DNR] has issued all permits and approvals identified in the listing...that are required prior to construction.

SOUL and the Ceylors contend that, based on the plain language of this statute, a CPCN cannot be issued by the PSC until the DNR has approved of the transmission line and granted all necessary permits. However, in this case, the PSC issued the CPCN before the necessary DNR permits had been issued.

In response, the PSC, the applicants, and the intervenors argue that the PSC was prevented from literal compliance with Wis. Stat. §196.491(3)(e) because of a statutory conflict. Under §196.491(3)(e), a CPCN cannot be issued by the PSC until all DNR permits are issued first. However, several DNR permits which are required for the Arrowhead-Weston project, such as permits under Wis. Admin. Code §NR 216.42(1) and Wis. Stat. §30.123(2), require the applicants to own the land the permits apply to.[1] Finally, under Wis. Stat. §32.03(5)(a), the applicants cannot obtain the power to condemn lands until the PSC issues the CPCN. In other words, "a literal application of the statutes would put public utilities attempting to construct ...transmission lines in a Catch-22: they could not obtain CPCNs without certain [DNR] permits, but they could not obtain these [DNR] permits without CPCNs." (Applicants Response Brief,

[1] In this case, the applicants do not own a significant portion of the land involved in the Arrowhead-Weston project.

page 8.) There is substantial evidence in the record to support the PSC's determination that the literal application of the above statutes to the Arrowhead-Weston project would have prevented the construction of the transmission line. Thus, the PSC and the applicants argue that the PSC appropriately resolved a statutory conflict by granting a conditional CPCN.

A. Due Weight Deference is the Appropriate Standard of Review

In reviewing the Commission's interpretation of Wis. Stat. § 196.491(3)(e), this court will employ the due weight standard of deference. The PSC's interpretation of Wis. Stat. §196.491(3)(e) is not one of longstanding, nor is the PSC in a better position than this court to interpret Wis. Stat. §196.491(3)(e), making it inappropriate to apply great weight deference. (See *Harnischfeger Corp. v. LIRC, 196 Wis.2d 650, 660, 539 N.W.2d 98 (1995).*) However, the PSC is responsible for enforcing §196.491(3)(e) and has some experience interpreting it, as demonstrated in *RURAL.* Therefore, under due weight deference, this court will uphold the PSC's interpretation if it comports with the purpose of Wis. Stat. §196.491(3)(e) and there is no more reasonable interpretation. *UFE Inc. v. LIRC, 201 Wis.2d 274, 286-287548 N.W.2d 57 (1996).*

B. *RURAL* is Controlling Precedent

This court's decision is guided by the Supreme Court's reasoning in *RURAL.* In that case, as in the present one, a petitioner objected to the PSC issuing a conditional CPCN before all DNR permits were granted, because it was contrary to Wis. Stat. §196.491(3)(e).[2] However, the court found the PSC's issuance of a conditional order a reasonable harmonization of the conflicting statutes and upheld its decision under a due deference standard. Although the Supreme Court noted that "[w]here the PSC has before it an application to process according to

[2] In *RURAL,* the PSC issued the CPCN prior to all permits being issued because of a conflict between §196.491(3)(e) and §96 of 1997 Wis. Act 204.

SOUL also argues that the PSC's interpretation of Wis. Stat. §196.491(3)(e) unlawfully grants the applicants the power of eminent domain. According to Wis. Stat. §32.07(1),

> [a] certificate of public convenience and necessity issued under s. 196.491 (3) shall constitute the determination of the necessity of the taking for any lands or interests described in the certificate.

SOUL contends that since the CPCN was issued before the DNR permits were granted, in violation of Wis. Stat. §196.491(3)(e), then the determination of 'public necessity' pursuant to the CPCN under Wis. Stat. §32.07(1) is also unlawful. Because a finding of public necessity, or public purpose, is a constitutional requirement for the exercise of eminent domain, SOUL concludes that the PSC's statutory interpretation has granted the applicants the power to condemn land without public purpose.

This court rejects SOUL's argument that "the legislature mandated a finding of 'necessary public use' is dependant upon the approval of the Commission under Wis. Stat. §196.491(3) and upon the approval of the DNR through its review of requisite permits under Wis. Stat. chs. 29 and 30 and Wis. Admin. Code, chs. 103 and 216..." (SOUL Initial Brief, page 15.)

First, SOUL cites no authority for this statement, and this court knows of no precedent upon which this conclusion is based. Second, Wis. Stat. §32.07(1) concerns the determination of the *necessity* of the taking, not whether the taking is for a public purpose. Third, as the PSC points out, there is nothing in the legislative history of Wis. Stat. §32.07(1) to indicate that "the Legislature intended that the exercise of condemnation authority for facilities was dependant on the receipt of all DNR permits." (PSC Brief, page 30.)

Finally, an agency's or a judge's finding of necessity is usually reviewed for the presence of "fraud, bad faith, or abuse of discretion." *Falkner v. Northern States Power Co., 75 Wis.2d*

In its Order Amending Final Order of December 19, 2003, the Commission held,

> This order takes effect on the day after mailing. The amended CPCN for the Arrowhead-Weston project is issued on the effective date of this order... The applicants shall not commence construction as defined in Wis. Stat. §196.491(1)(b) on those construction spreads that require DNR approvals and permits prior to construction *until they obtain from the DNR all approvals and permits identified by the DNR as required to be issued prior to construction on those construction spreads...*

Clearly, although immediately 'effective,' the order in question is conditional, as it prevents construction until and unless the DNR grants permits for the construction of the transmission line.

SOUL also argues that the PSC could have issued a conditional order that was more limited but still harmonized the statutes and rules.[3] However, there are two problems with SOUL's argument. First, the DNR informed the applicants "it is clear that, until the condemnation proceeding is completed, the condemner has no interest in property which can reasonably be accepted by the Department as fulfilling the requirements of aforementioned statutes and rules." (Applicants Response Brief, Tab F, App. Page 14.) It does not appear that SOUL's proposed order would have satisfied the DNR's requirement of landowner status. Secondly, under the due deference standard, this court will only overturn an agency's decision if there is a more reasonable interpretation of law. While SOUL's proposal may be a valid interpretation, SOUL's proposed CPCN, in light of the opinion of the DNR and the decision in *RURAL*, is not *more* reasonable. Because the PSC was faced with a statutory conflict and reasonably harmonized the conflicting provisions, its decision will be upheld.

C. The PSC Did Not Unlawfully Grant the Applicants the Power of Condemnation

[3] SOUL's proposed CPCN states, "Because the CPCN provides conditional condemnation authority to the Applicants, it shall: 1) For purposes of Wis. Stat. §30.123(2), constitute conditional "evidence of permission to construct the bridge from riparian owners"; and 2) for purposes of Wis. Admin. Code §§NR 216.42(1) and 216.44, it shall serve as conditional evidence that the Applicants are the "landowners" who intend to obtain storm water discharge permits." (SOUL initial brief at 20)

the longer timeline in Wis. Stat. § 196.491(3), the PSC should, and could, comply with subdivision (e)," it is the court's allowance of the conditional CPCN prior to the issuance of the DNR permits, and not its general requirement that an agency should follow the plain language of the law, that directs my decision in this case. *RURAL* clearly illustrates that it is a reasonable and acceptable solution for the PSC to issue a conditional CPCN to effectuate the purpose of conflicting statutes. "In construing statutes that are seemingly in conflict, it is our duty to attempt to harmonize them, if it is possible, in a way which will give each full force and effect." *RURAL* at 700 (citing *Milwaukee v. Kilgore, 193 Wis.2d 168, 184 532 N.W.2d 690, (1995)*).

In this case, the application of Wis. Stat. §196.491(3)(e) conflicts with DNR permitting requirements where applicants lack landowner status. The PSC resolved this conflict by issuing a conditional CPCN, which gives effect to §196.491(3)(e) by conditioning *construction* under the CPCN on the issuance of DNR permits, prohibiting condemnation without a CPCN in accordance with §32.03(5)(a), and upholding the DNR's requirement that an applicant own the land in order to receive permits under §30.123(2). Thus, it was reasonable and appropriate for the PSC to issue a conditional CPCN in order to harmonize the conflict between Wis. Stat. §§ 196.491(3)(e), 32.123(2), and 32.03(5)(a).

SOUL argues that this court should remand the PSC's issuance of the CPCN because it was not conditional. It notes, "in its 2003 Final Decision, the Commission deleted the conditions at issue and ordered that the CPCN is effective without further acts of the DNR." (SOUL's Initial Brief, pages 25-26.) In addition, "[i]nstead of coordinating with the DNR, by issuing an effective and appropriately conditioned CPCN, the Commission unilaterally found that all necessary DNR permits had been issued thereby overriding the DNR's exclusive jurisdiction." (SOUL's Reply Brief, page 8.) However, SOUL is mistaken.

116, 132, 248 N.W.2d 885 (1977). Applying this standard to the PSC's issuance of the CPCN, there is no evidence of fraud or bad faith, and this court determined above that it was not an abuse of discretion for the PSC to issue the CPCN prior to the issuance of the DNR permits. Therefore, the PSC did not unlawfully grant the applicants the power of eminent domain.

II. The PSC Did Fulfill Its Obligation to Review Environmental Impacts Under WEPA

The petitioners next argue that the PSC violated Wis. Stat. §1.11, Wisconsin's Environmental Protection Act, by failing to prepare a supplemental environmental impact statement (SEIS). Specifically, SOUL alleges that not only did the PSC fail to undertake a factual inquiry into whether an SEIS was required, as evidenced by the lack of a reviewable record, but also that an SEIS was required, based on the project's increased cost. The Commission and the applicants disagree with SOUL, claiming that the proposed changes to the project do not have an environmental impact, and increased cost alone does not trigger the need for an SEIS.

Under Wis. Admin. Code §PSC 4.35(2), the PSC is required to prepare an SEIS when there are,

> 1. Substantial changes to the proposed action, or significant new circumstances, that would affect the quality of the human environment in a significant manner or to a significant extent not already considered in the draft EIS. 2. New information about whether the proposed action would affect the quality of the human environment in a significant manner or to a significant extent not already considered in the draft EIS.[4]

[4] Although Wis. Admin. Code §PSC 4.35(2) addresses the preparation of an SEIS prior to the "final decision on a proposed action," it is applicable to the present situation, as well. Although there are no regulations addressing the preparation of an SEIS when a final decision is amended, in both cases a previous EIS is completed, and its application comports with the requirement of WEPA that all agencies prepare statements on "actions significantly affecting the quality of the human environment" Wis. Stat. §1.11(2)(c).

All parties appear to agree on this point. However, *the standard of review* for whether an SEIS should have been created is hotly disputed in this case. SOUL contends that this court must answer two questions to determine whether the PSC should have created an SEIS:

> 1) whether the Commission developed a reviewable record reflecting relevant areas of environmental concern in sufficient depth to permit a reasonably informed preliminary judgment of the environmental consequences of the action proposed; and 2) giving due regard to the Commission's expertise where it appears actually to have been applied, does the Commission's determination follow from the results of the Commission's investigation in a manner consistent with the exercise of reasonable judgment by an agency committed to compliance with WEPA's obligations.

(SOUL's Initial Brief, page 33, citing *Wisconsin's Environmental Decade v. PSC, 79 Wis.2d 409, 419, 256 N.W.2d 149 (1977).*)

In contrast, the PSC contends that the court should examine the original EIS's adequacy, not whether an SEIS should have been created. The PSC cites to *Citizens' Utility Board v. PSC, 211 Wis.2d 537 (Ct. App. 1997)*, for the proposition that an EIS's adequacy

> is an application or interpretation of law, reviewable under §227.57(5), Stats., and entitled to great weight deference from a reviewing court. The PSC's determination of EIS adequacy will be sustained if it is 'merely...reasonable,' and the burden of proof is on [the petitioner] to show that the PSC's determination of adequacy is unreasonable.

CUB v. PSC, 211 Wis.2d 537, 552-553, 565 N.W.2d 554 (Ct. App. 1997).

The test proposed by SOUL is the test fashioned by the Supreme Court in a case where the PSC rather summarily declined to prepare an EIS not long after Wisconsin's passage of WEPA. This is not such a situation. The record in this case does contain an extensive EIS. The question here is whether there are substantial changes to the project or new information about the project's environmental impact requiring a supplemental EIS. It is, of course, fair to expect the

Commission to create a record regarding the issue and to be reasonable in reaching its conclusion. I am satisfied that the PSC accomplished both.

There is no doubt but that the record demonstrates a huge cost increase for the project. A cost increase, though, does not warrant supplementing an EIS. SOUL argues that an SEIS is required for purely economic changes. SOUL contends that the PSC was required to prepare an SEIS in this case because of the substantial cost increase, even if it determined that there were no environmental effects from the other proposed changes. It contends, "[e]ven if the Commission had somehow been able to determine (without a hearing record) that the proposed design, substation, fiber optic, and other changes to the Arrowhead-Weston project would not constitute increased "cumulative impacts," it still should have prepared a supplemental EIS based on the very substantial cost increases." (SOUL Initial Brief, page 41.) SOUL cites *Friends of the Wild Swan v. Department of Natural Resources and Conservation, 6 P.3d 972, 979-80 (Mont. 2000)* in support of its argument, because that court stated, "there is no requirement...that a substantial change must result in an additional impact to the environment before a supplemental EIS is required." *Id.*

In light of the language of WEPA, the PSC's regulations, and previous Wisconsin cases, SOUL's argument is not consistent with Wisconsin law. As explained by the applicants, the President's Council on Environmental Quality Guidelines, which apply to Wisconsin agencies under WEPA, state that, "economic or social effects are not intended by themselves to require preparation of an environmental impact statement." *Wisconsin's Environmental Decade, Inc. v. Wisconsin Department of Natural Resources, 115 Wis.2d 381, 397, 340 N.W.2d 722 (1983).*

According to the PSC's regulations, substantial changes only compel a supplemental EIS when those changes would affect the quality of the human environment.[5]

Furthermore, although an EIS, and therefore an SEIS, must evaluate "significant socioeconomic effects" (see Wis. Admin Code §PSC 4.30(1)(b)), the issue being reviewed is whether an SEIS should have been prepared, not whether an SEIS was adequate. When considering whether an SEIS should have been prepared, the threshold factor is environmental impacts. Similarly, in *Stauber v. Shalala 895 F. Supp. 1178 (W.D. Wis. 1995)*, the federal district court indicated that NEPA does not require the preparation of an EIS for socioeconomic effects.

> "[T]he regulations promulgated under the National Environmental Policy Act provide that "economic or social effects are not intended by themselves to require preparation of the environmental impact statement." 40 C.F.R. § 1508.14. Plaintiffs are wrong when they assert that Posilac's socioeconomic effects on the dairy farmer require the preparation of an environmental impact statement. *See Missouri Coalition for the Environment v. Corps of Engineers of United States Army,* 866 F.2d 1025, 1031-32 (8th Cir.), *cert. denied,* 493 U.S. 820, 110 S.Ct. 76, 107 L.Ed.2d 42 (1989). **It is true that an environmental impact statement must discuss economic or social effects of the proposed action to the extent those effects interrelate to its natural or physical environmental effects, but the regulations do not contemplate an independent consideration of socioeconomic effects when there is no determination that the proposed agency activity will significantly effect the environment.** *Id.*

Id. at 1194 (bold emphasis added). Therefore, the PSC's failure to prepare an SEIS solely due to increased cost was not an error.

Apart from the vastly increased cost, changes to the project included the use of fiber optic cable, changes to the design of two substations, and a mitigation plan to address potential biosecurity issues.

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[5] According to Wis. Admin. Code PSC 4.05(9), "Human environment" means the natural or physical environment and the relationship of people with that environment."

When determining the adequacy of a record, "[w]e examine the record to see whether the [agency] considered relevant areas of environmental concern and whether the [agency] conducted a preliminary factual investigation of sufficient depth to permit a reasonably informed preliminary judgment of the environmental consequences of the proposed action." *State ex. rel. Boehm v. Wisconsin Department of Natural Resources, 174 Wis.2d 657, 666-667, 497 N.W.2d 445 (1993)*. However, a reviewable record need not be in any particular format. *Id.* at 667. In this case, I am satisfied a reviewable record exists.

1. Substation improvements:

In consideration of the proposed changes at both the Weston and Stone Lake substations, ATC hired the firm of Burns & McDonnell to prepare an environmental review. The Burns & McDonnell report was incorporated into the record as Exhibit 409. The environmental review analyzed the presence of wetlands, construction procedures to be used, and a section on "general environmental information, including land use and zoning, and impacts to wetlands, forest, agriculture land, and endangered resources." (Rec. Item 356, Ex. 409, page 3.)

In addition, ATC and the PSC provided testimony on the environmental review during the technical hearings. According to the Environmental Project Manager at ATC, the environmental review included a review of threatened and endangered species and a cultural resources review. The review concluded that the Weston substation will not impact any wetlands, cultural resources, or threatened and endangered resources, and will only have a minor impact on agricultural land and forested areas. The Stone Lake substation will not impact any wetlands, agricultural lands, threatened and endangered resources, and cultural resources, but will have an impact on two to five acres of forested areas. The Environmental Analysis and Review Specialist of the PSC also testified about the substation impacts.

Despite SOUL's contention that the need for an SEIS was not addressed in the technical hearings, ALJ Whitcomb stated, "In addition environmental impacts are addressed in the issues that the Commmission identified for this phase of the hearing although they are limited to the substation. So whether or not they should prepare a supplemental EIS for the substation or not is clearly assumed within the issues." (9/19/03 hearing; Rec. Item 353, vol. 43, pg. 10817.) Although SOUL could have introduced testimony on the potential environmental impact of the substation changes, it did not. Its only proffered evidence was the testimony of Secretary Meyers, who spoke of the need for an SEIS in general terms.[6]

Based on the evidence presented in the environmental review and the technical hearings, it is clear that the PSC created a reviewable record regarding the potential environmental impacts of the substation improvements. The PSC examined whether there would be any significant environmental impacts from the substation changes, and found practically none. Therefore, the PSC's decision that an SEIS was not needed regarding the substation improvements will be upheld.

2. Fiber optic cable:

The applicants initially proposed to include a 48-strand fiber optic cable within a shield wire of the system. Only 12 strands were needed for system communications and security. In its original decision, given concern over the potential that some of the fiber optic capacity might be used for a telecommunication enterprise, the PSC rejected the fiber optic able. The applicants currently propose a 12-strand fiber optic cable.

In terms of environmental impact, this proposal is nothing new. The impact of the fiber optic system was evaluated in the original EIS at pages 299-301. The physical impact of the

[6] The applicants' motion to strike Secretary Meyers's testimony from a portion of SOUL's initial brief is addressed separately.

fiber optic system amounts to cable in a shield wire that is part of the system and four signal regeneration stations, garage-size structures, at 50-60 mile intervals along the transmission line. The impact of this element of the plan has been addressed in the original EIS. Precise locations for the regeneration stations weren't known at the time of the EIS. However, in light of the scope of the overall project involved here, these four small structures can't be said to be a substantial change. The fiber optic cable does not require supplementing the EIS.

3. Biosecurity or Farm Disease Mitigation:

SOUL also argues that the PSC should have prepared an SEIS based on the still-developing farm disease mitigation program that was included in the applicants' increased cost estimate. The mitigation program amounts to cleaning equipment of manure, seeds, mud and weeds, so as not to transfer noxious materials or possible disease from one area to another. This mitigation plan is not a 'substantial change' to the transmission line. The question is whether the potential transmission of animal or plant diseases presents "[n]ew information about whether the proposed action would affect the quality of the human environment in a significant manner or to a significant extent not already considered in the... EIS." (Wis. Admin. Code §PSC 4.35(2).)

The PSC recognized that farm disease mitigation is an emerging issue and that necessary techniques to deal with it are not well developed in the record or in practice. (*Order Modifying Final Order, p. 11).* The PSC ordered the applicants to submit more detailed cost estimates and protection plans before commencing, as well as during, construction. The record here does not lead to the conclusion that there is new information indicating this project will affect the human environment in a significant manner. Rather, it indicates that, as a precautionary measure, the applicants will take steps to avoid the transfer of material from one parcel of land to another. If reliable new information on the issue existed and if the applicants did not propose to prevent

material transfer, then there might be a reason for an SEIS. On the record before me, though, I am satisfied that the PSC acted reasonably.

4. River crossing

Finally, SOUL peripherally raises the issue of whether an SEIS was needed for the proposed Namekagon River Crossing. As stated earlier, under Wis. Admin. Code §PSC 4.35(2) the PSC needs to consider whether an SEIS is necessary where there are significant new circumstances or new information. The proposed Namekagon River crossing was addressed in the PSC's October 30, 2001 Final Decision. There were no changes to the proposed crossing in the revised decision. Thus, there was no need for the PSC to create a reviewable record of its consideration of the potential environmental impact of the Namekagon River crossing in the reopened proceeding.

III. The Petitioners Have Not Been Prejudiced by the PSC's Procedural Error Under Wis. Stat. §196.24(3)

The next issue raised by SOUL is a matter of statutory interpretation. Wis. Stat. §196.24(3) states in relevant part,

> The decision of the commission shall comply with s. 227.46 and shall be based upon its records and upon the evidence before it, except that, *notwithstanding s. 227.46 (4), a decision maker may hear a case or read or review the record of a case if the record includes a synopsis or summary of the testimony and other evidence presented at the hearing that is prepared by the commission staff.*

(Emphasis added.) The petitioners contend that this statute affords the Commission decision-makers two options when deciding a case: the commissioners can either personally hear the case,

or else they can read or review the record, as long as staff summaries are provided. In contrast, the PSC maintains that it has three options: commissioners can either hear the case, read the record without staff summaries, or review the record as long as staff summaries are prepared.[7] SOUL sums up this dispute nicely when it says, "[e]ssentially, the parties are disputing an 'or' and the absence of a comma." (SOUL Reply Brief, page 31.)

According to Wis. Stat. §227.57(4), a court must remand an agency's decision if it determines that "the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure." In order to determine if the PSC committed an error in procedure, it is necessary to evaluate whether the PSC interpreted Wis. Stat. §196.24(3) correctly. This court will review the PSC's interpretation of Wis. Stat. §196.24(3) *de novo*, because the PSC is not better suited than this court to interpret the statute, and there is no evidence that the PSC has expertise in interpreting this area of the law, as this appears to be an issue of first impression. Therefore, the PSC's interpretation is afforded no deference.

A. The PSC Must Receive a Synopsis of Evidence Presented at the Hearing if the Decision Makers Do Not Hear the Case.

Both SOUL and the PSC argue that the order of the words in Wis. Stat. §196.24(3), the use of the words 'shall' or 'may,' and the legislative history influence the meaning of the phrase "a decision maker may hear a case or read or review the record of a case if the record includes a synopsis or summary of the testimony and other evidence presented at the hearing that is prepared by the commission staff" in their favor. However, the first step of statutory interpretation begins with reading the plain language of the provision in question. As stated in

[7] The applicants contend that Wis. Stat. §227.46(4) provides a fourth alternative, allowing a person who has read the record to present a proposed decision to the PSC and the parties, subject to written objections and oral argument.

Kitten v. State Department of Workforce Development, 2002 WI 54, ¶33, 252 Wis.2d 561, 578, 644 N.W.2d 649,

> As with all questions of statutory interpretation, our goal is to discern the intent of the legislature. To determine legislative intent, we first look to the plain language of the statute. If the legislature's intent can be determined from the clear and unambiguous language of the statute, we do not look beyond the statutory language to ascertain its meaning.

(Internal citations omitted.)

It is this court's belief that the plain language of Wis. Stat. §196.24(3) offers a Commission decision maker the choice of either hearing a case, or else reading or reviewing the record *as long as when reading or reviewing the record, the record is accompanied by a staff-prepared summary.* Reading the statute any other way ignores the plain language of this provision.

Parsing the statute under the Commission's analysis would give the decision makers three choices:

- Hear the case
- Read
- Review the record if it contains a synopsis or summary.

Read what?

The Commission argues that the limiting words following "if" refer only to the next preceding antecedent. *Fuller v. Spieker, 265 Wis. 601, 605, 62 N.W.2d 713 (1954).* "Antecedent" is a technical term in grammar for the word or phrase to which a relative pronoun refers. A pronoun stands in for a noun, not a verb. As I have crafted the statute above (modifying it only to insert a relative pronoun), the antecedent is "record", not "review".

It is certainly true that the Commission sought a change to the statute to accomplish its current interpretation during the consideration of 1997 Act 204. The Commission did not get

what it asked for. I decline to visit the legislative history in detail, in any event, because I discern no ambiguity in the statute. Commissioners can hear a case. Or they can read or review the record if the record contains a synopsis or summary. Whether they "read" it or "review" it, though, it must contain a synopsis or summary.

Thus, based on the plain meaning of the statute, the PSC was required to read staff-prepared summaries of evidence presented at the hearings, in addition to reading the record. The PSC failed to do this.

B. SOUL's Procedural Due Process was Not Violated by the PSC's Failure to Read Staff Summaries

Although the PSC violated the plain meaning of the statute in deciding this case, the inquiry does not end there. According to Wis. Stat. §227.57(4), "the court shall remand the case to the agency for further action if it finds that either the *fairness of the proceedings* or the *correctness of the action* has been *impaired* by a material error in procedure or a failure to follow prescribed procedure." (emphasis added) Therefore, the PSC's decision will not be remanded unless the fairness or correctness of the proceeding has been impaired by a material error. SOUL alleges prejudice on the ground that the PSC's failure to review staff-prepared summaries violated its procedural due process. This is an issue that is reviewed *de novo*.

There is a clear line of cases that stand for the proposition that, in certain circumstances, a party's procedural due process is violated when an agency makes findings of fact without hearing the case or receiving credibility determinations from the hearing examiner. However, all of these cases concern agency decisions in which the hearing examiner's findings are reversed based on witness credibility.

For example, *Epstein v. Benson, 2000 WI App 195, 238 Wis.2d 717 618 N.W.2d 224* and *Mayville School District v. Wisconsin Employment Relations Commission, 192 Wis.2d 379 531*

N.W.2d 397 (Ct. App. 1995) stand for the proposition that procedural due process may be violated if an agency decision maker reverses the holding of the examiner when the findings are based on witness credibility. In *Conradt v. Mt. Carmel School, 197 Wis.2d 60 539 N.W.2d 713 (Ct. App. 1995)*, the Court of Appeals addressed whether a credibility conference is always required, even when the agency agrees with the hearing examiner's findings of fact. The court held that a credibility conference is only required "as a condition precedent to overruling the ALJ." *Id. at 73.*

Unlike other agencies, the PSC's administrative law judges do not make proposed findings of fact or conclusions of law.[8] Thus, the PSC decision makers never reverse the decisions of their hearing examiners, and it is questionable whether the previously cited case law is applicable in this case. However, in *Thomsen v. Wisconsin Employment Relations Commission, 2000 WI App 90, 234 Wis.2d 494, 610 N.W.2d 195*, the court of appeals cited to the following passage:

> **Where there is a conflict in the testimony, and the weight and credibility to be given testimony of the various witnesses is the determining factor**, in order to accord a 'full hearing' to which all litigants are entitled, the person who conducts the hearing, hears the testimony, and sees the witnesses while testifying, whether a member of the board, or an examiner or referee, must either participate in the decision, or where, at the time the decision is rendered, he has severed his connections with the board, commission or fact-finding body, the record must show affirmatively *that the one who finds the facts had access to the benefit of his findings, conclusions, and impressions of such testimony, by either written or oral reports thereof.* This does not necessarily require that all of the commissioners must be present at the hearing, or even that the one hearing the evidence must concur in the result, *but his opinion on the testimony must be available to the commission in making its decision.*

[8] See Wis. Admin. Code PSC 2.04(1), which by excluding Wis. Stat. §227.46(1)(h) from the powers of an ALJ, prevents the ALJ from "mak[ing] or recommend[ing] findings of fact, conclusions of law..." 227.46(1)(h).

Thomsen at 520. (citing *Wright v. Industrial Commission, 10 Wis.2d 653, 659-660 103 N.W.2d 531 (1960)*; internal citations omitted, bold emphasis added, italics in the original). Therefore, a party's procedural due process is violated if PSC decision makers do not hear a case but render a decision where witness credibility is the determining factor, without receiving the impressions of the ALJ. As a result, this court concludes that the PSC did not violate SOUL's right to procedural due process because issues of witness credibility were not the determining factor in the Commission's decision.

It is helpful to compare the issues in the present case with other situations in which credibility determinations were the determining factors. For example, in *Thomsen*, the issue in question was whether a memorandum of understanding accurately represented a settlement agreement reached between the parties. In that case, the credibility of the witnesses testifying as to the content of the settlement agreement was key. In *Braun v. Industrial Commission, 36 Wis.2d 48 153 N.W.2d 81 (1967)*, the issue was whether an employee's injury occurred during the course of his employment, making the credibility of the employee a determining factor. Finally, in *City of Appleton v. DILHR, 67 Wis.2d 162 226 N.W.2d 497 (1975)*, the cause of death of an employee was in issue, and the court relied heavily on the credibility of the medical testimony.

In contrast, the issues in the present case do not turn on the credibility of witnesses. Unlike the cause of a physical injury in a compensation hearing or the content of an oral agreement in a contract dispute, the believability of the "strong feelings" of the opponents of the Arrowhead-Weston transmission line is not the determining factor in the cost of land acquisition; landowner opposition is one of many factors. Similarly, the conviction with which Secretary

Meyer spoke on the general need for a supplemental EIS was not a determining factor in the PSC's decision not to prepare an SEIS.

In reaching the decision that the PSC has not violated SOUL's procedural due process, this court does not believe, as SOUL contends, that "due process is required in administrative hearings, but since it would not be violated too often in this context, it is acceptable for the Commissioners just to read the record." (Reply Brief, page 36.) Rather, *in this instance*, the credibility of the witness testimony that should have been summarized was not the determining factor of the issues addressed at the hearings.

Because the credibility of witnesses was not the determining factor in the PSC's *Order Modifying Final Order*, SOUL's procedural due process was not violated by the lack of credibility summaries.

C. Because the Commissioners Read the Record, the Completeness of the Decision Matrix and Briefing Memorandum is Irrelevant

The Ceylors have raised a separate complaint regarding the PSC's use of supplemental documents. Specifically, the Ceylors object to the PSC's use of a decision matrix and briefing memorandum, because these documents were prepared prior to the completion of the case. According to the Ceylors, the PSC's use of these documents was "procedurally flawed, both in its distribution to parties for review, its lack of an update, its preparation, and in its existence without any committed purpose for review." (Ceylor Reply Brief, page 13.)

It has been conclusively determined that the PSC decision makers read the record. Even if the decision matrix and the briefing memorandum are incomplete, the PSC was apprised of any missing information by reading the information in the record. In addition, since the Commissioners read the record, the PSC's failure to allow the Ceylors to review or object to

these documents was not procedural error under 227.46(4).[9] Therefore, this argument is without merit.

IV. Energy Priorities Law, Wis. Stat. §1.12

Petitioners argue that the Commission applied the Energy Priorities Law, Wis. Stat. 1.12, in an arbitrary and capricious manner. They claim the Commission failed to investigate and approve cost-effective efficiency alternatives. In their reply brief Petitioners point out that the Commission's interpretation of the Energy Priorities Law has recently changed. Where the Commission used to ask whether alternatives would substitute for a proposed project, it now takes the view that it can require incremental implementation of alternatives. (October 7, 2004 Final Decision, Docket 6690-CE-187, pp. 11-12)

The Commission and the applicants respond that alternatives were considered, that the alternatives fell far short of providing the energy of the proposed power line, and that, in any event, no combination of alternatives addressed the security issues existing in the transmission system.

The interpretation of the Energy Priorities Law and an analysis of competing energy alternatives are matters particularly within the Commissions area of expertise. Its decision is entitled to great weight. While the Commission's interpretation of the statute has changed slightly, either view of the energy Priorities Law is reasonable. A slight shift from one administration to another is not terribly surprising.

As the applicants and the Commission point out, the record does contain analyses based on both "complete replacement" and "partial offset" approaches. The Commission's conclusion that this project is "the option that addresses all of those security issues" (Order Modifying Final

[9] As stated in section IIIA, Wis. Stat. §227.46(4) requires the PSC to issue a *draft decision* for review by the parties prior to issuing a final decision if the PSC did not *read the record* or hear the case.

Order, p. 25) is based on substantial evidence in the record. I cannot conclude that the Commission erred in any way in its application of the Energy Priorities Law.

V. The Ceylors Do Not Have Standing for Review of the Farm Disease Mitigation Plan.

The Ceylors allege that the PSC acted outside the scope of its authority because it "has charged itself with review of both biosecurity issues, and farmland mitigation and disease issues which are not part of its expertise." (Ceylor Brief, page 4.) However, the Ceylors have no standing to petition for review of this issue. In *Fox v. Department of Social Services, 112 Wis.2d 514 334 N.W.2d 532 (1983)*, the Wisconsin Supreme Court noted that in order to have standing to challenge an administrative agency's decision, "the petitioner must have 'suffered 'some threatened or actual injury resulting from the putatively illegal action'....'" *Id.* at 524-525 (citing *State ex. Rel First National Bank of Wisconsin Rapids v. M&I Peoples Bank of Coloma, et al.,95 Wis.2d 303, 308, 290 N.W.2d 321 (1980)* (internal citations omitted)). An injury may be physical or economic, as well as aesthetic, conservational or recreational. (*Id.* at 537-38)

The Ceylors have not alleged that they will be injured by the PSC's decision to implement a farmland disease mitigation plan. The Ceylors are "electric utility customers and ratepayers and owners and operators of a dairy farm...[with] an interest in environmental quality and the preservation of the rural and agricultural character of the route selected for the Arrowhead-Weston transmission line project." (Ceylor Brief, page 3.) In addition, they have an agreement to purchase land near the transmission line's route and enjoy recreation near the route of the transmission line. However, the Ceylors do not object to the farmland disease mitigation program based on environmental concerns, nor do they allege that it will impact their interests. Instead, they object to the plan based on the allegation that creating such a program is outside the

scope of the PSC's authority and might be inequitably applied to various farms (not theirs), increase the cost of the project in unknown ways, and lack proper supervision. Because there is no evidence that the Ceylors will be aggrieved in any way by the PSC's farmland mitigation plan, the Ceylors lack standing to challenge this aspect of the PSC's order. Therefore, this court cannot consider this issue.

CONCLUSION

The petitioners have challenged the PSC's Order Modifying Final Order on numerous grounds. As discussed above, the PSC's order is valid on all counts.

ORDER

For the reasons stated above, the PSC's Order Modifying Final Order is hereby affirmed.

Dated this 24th day of January, 2005.

04CV138
C. WILLIAM FOUST
Dane County Circuit Court
Branch 14

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

SAVE OUR UNIQUE LANDS, INC., CLEAN WISCONSIN, INC., THOMAS AND MARGARET KREAGER, GERALD AND LINDA CEYLOR,,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Respondent.

Consolidate Case No. 04-CV-138
Administrative Agency Review:
30607

NOTICE OF ENTRY OF JUDGMENT

TO: Mr. Gerald And Ms. Linda Ceylor
N3689 Riley Road
Catawba, WI 54515-9537

PLEASE TAKE NOTICE that the attached Decision and Order, dated January 24, 2005, was entered by its filing with the office of the Clerk of the Circuit Court for Dane County on January 24, 2005.

Dated February 11, 2005

MICHAEL BEST & FRIEDRICH LLP

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